First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between September 4, 2014 and February 18, 2015. This collection, written by the members of the *Seton Hall Circuit Review*, is organized by circuit.

Each summary briefly describes an issue of first impression, and is intended to give only the briefest synopsis of the issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

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FIRST CIRCUIT

***Butterworth v. United States*, 775 F.3d 459 (1st Cir. 2015)**

QUESTION: Whether "the rule announced in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), applies retroactively to sentences challenged on an initial petition for collateral review?" *Id*. at 461.

ANALYSIS: The court began with 28 U.S.C. § 2255(f)(3) to decide whether the statute permitted the court to make a "retroactivity determination on an initial petition for collateral review." *Id*. at 464. The court joined the 3rd, 5th, 6th, and 11th circuits and concluded that it could issue opinions on "initial petitions for collateral review holding in the first instance that a new rule is retroactive in the absence of a specific finding to that effect by the Supreme Court." *Id*. Nevertheless, the court determined that *Alleyne* "did not cut a new rule from whole cloth, but rather clarified and extended the scope of two well-settled principles of criminal procedure: the defendant's right to a jury trial and the government's burden of proof beyond a reasonable doubt." *Id*. at 468.

CONCLUSION: The 1st Circuit concluded that "the rule announced in *Alleyne* [was] not retroactively applicable to sentences on collateral review on an initial habeas petition." *Id*.

***Ira Green, Inc. v. Military Sales & Serv. Co.*, 775 F.3d 12 (1st Cir. 2014)**

QUESTION: Whether a party who requests a jury poll must act reasonably to preserve its rights to do so. *Id*. at 16.

ANALYSIS: The Court first explained that the 2009 update to Federal Rule of Civil Procedure 48 clarified that a party was entitled to a mandatory jury poll upon a timely request. *Id*. at 25. The court recognized that a gray area exists in regards to the civil context and jury polls, but declined to address this issue in the present case. *Id*. at 26. The court instead focused on the timing of the jury poll, and determined that if a party makes two requests of the court, and the court inadvertently fails to make a ruling on one of the requests, that failure to rule cannot be construed as a denial by the court. *Id*. at 26. The court further posited that when a court forgets to answer a party's request, it is the party's responsibility to act reasonably by making the request again. *Id*. at 26–27.

CONCLUSION: The 1st Circuit held that when a party has ample time to remind the court of its request for a jury poll, but fails to do so, the party has acted unreasonably and thus waives or forfeits the right to a jury poll. *Id*.

***Romulus v. CVS Pharm. Inc.*, 770 F.3d 67 (1st Cir. 2014)**

QUESTION: What is the meaning of "other paper" under 28 U.S.C. § 1446(b)(3).

ANALYSIS: The court found that the phrase "other paper" in Section 1446(b)(3) was ambiguous, but concluded that there was "clear Congressional intent" to interpret the phrase broadly. *Id*. at 77. The court reasoned that § 1446(b)(3)'s use of "other paper" should seemingly be "limited to documents similar to a pleading, motion, or order," under the doctrine of *ejusdem generis*. *Id*. The court further stated that another part of the statute, § 1446(c)(3)(A) supports a "broader textual interpretation," by stating that "[]information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3)." *Id*. Lastly, the court noted that federal circuit courts have "given the reference to 'other paper' an expansive construction," and have included a wide variety of documents within the scope of this phrase. *Id*. at 78.

CONCLUSION: The court held that the an email belonging to the plaintiff, providing the defendant with notice that the criteria for removal are met, constitutes "other paper" for purposes of section 1446(b)(3), and by doing so, adopted a broad interpretation of the phrase "other paper." *Id*.

***United States v. McCormick*, 773 F.3d 357 (1st Cir. 2014)**

QUESTION: Whether an "accessory" qualifies as a "participant" in a criminal activity for "purposes of an upward role-in-the-offense adjustment under the U.S. Sentencing Guidelines Manual § 3B1.1." *Id*. at 360.

ANALYSIS: The court noted that the guideline provision states "if the defendant was an organizer, leader, manager, or supervisor in any criminal activity, her offense level should [. . .] be increased by two levels." *Id*. The court reasoned that such an increase may occur only if the government proves that "(1) the criminal enterprise involved at least two complicit participants (of whom the defendant may be counted as one), and (2) the defendant, in committing the offense, exercised control over, organized, or was otherwise responsible for superintending the activities of, at least one of those other persons." *Id*. Further, the court determined that the appellant in the instant matter aced as an accessory by performing the role of the getaway driver in a robbery. *Id*.

CONCLUSION: The 1st Circuit held that "a party who knowingly assists in a criminal enterprise is responsible as an accessory . . . " and that "such a level of engagement is sufficient to qualify the accessory as a

'participant' in a criminal activity for purposes of an upward role-in-the-offense adjustment under Section 3B1.1. *Id*. at 360–61.

SECOND CIRCUIT

***Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014)**

QUESTION ONE: Whether "petitioners are precluded from recovering because North Korea's designation as a state sponsor of terrorism was revoked in 2008, prior to the entry of the underlying judgment?" *Id*. at 996.

ANALYSIS: The 2nd Circuit stated that after the Terrorism Risk Insurance Act (TRIA) was enacted, Congress enacted 28 U.S.C. § 1610(g), which allowed attachment for judgments obtained under 1605(A). *Id*. at 999. The court noted that the section allowed "attachment of property of a foreign state but also property of an agency or instrumentality." *Id*. The court emphasized that in order to attach assets under TRIA there needed to be a judgment against a terrorist party, however, the underlying judgment that was entered against North Korea was entered when North Korea was "no longer designated a state sponsor of terrorism." *Id*.

CONCLUSION: The 2nd Circuit held that since the judgment was not entered against a terrorist party, the judgment could not attach the ETFs under TRIA § 201(a). *Id*. 1000.

QUESTION TWO: Whether "the EFTs sought to be attached are the property of North Korea, or of its agencies or instrumentalities, and therefore properly subject to execution to satisfy a judgment against North Korea." *Id*. at 996.

ANALYSIS: The 2nd Circuit began by noting that § 1610(g) was not limited to current states that designated terrorism the way TRIA was limited. *Id*. at 1000. The court further explained that whether there could be an attachment of the EFTs under section 1610(g) turned "on whether the blocked EFTs at issue are "property of" North Korea or "the property of an agency or instrumentality" of North Korea." *Id*. Ultimately, the court found that since Congress had not defined the property interest that were subject to attachment under the Foreign Sovereign Immunities Act (FSIA), the court had to look to state law on the issue of the rights of debtors and creditors. *Id*. at 1001.

CONCLUSION: The 2nd Circuit held "that an EFT blocked midstream is 'property of a foreign state' or 'the property of an agency or instrumentality of such a state,' subject to attachment under 28 U.S.C. § 1610(g), only where either the state itself or an agency or instrumentality

thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block." *Id*. at 1002.

***Coggins v. Buonora*, 2015 U.S. App. Lexis 487 (2d Cir. Jan. 13, 2015)**

QUESTION: "[W]hether a law enforcement officer is entitled to absolute immunity as a grand jury witness, pursuant to *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012), when a plaintiff alleges that the officer withheld and falsified evidence in addition to committing perjury before the grand jury under 42 U.S.C. § 1983. *Id.* at 8.

ANALYSIS: The court first noted that in *Rehberg*, the Court allowed law enforcement officials to claim absolute immunity from § 1983 claims only when those claims were based on the officers' grand jury testimony alone. *Id*. The court then found that if a plaintiff's claim exists independently of an officer's grand jury testimony, it is not "based on" that grand jury testimony, as that term is used in *Rehberg,* and thus that holding does not apply. *Id.* at 9–10. The court concluded that "when a police officer claims absolute immunity for his grand jury testimony under *Rehberg*," the court should first "determine whether the plaintiff can make out the elements of his § 1983 claim without resorting to the grand jury testimony," instead of making a per se determination that the officer is entitled to absolute immunity. *Id*. at 10.

CONCLUSION: The 2nd Circuit held that police officers are not afforded "absolute immunity from all civil suits for conduct other than their grand jury testimony," therefore declining to extend police officers *per se* absolute immunity from civil liability when officers withhold or falsify evidence before a grand jury. *Id*. at 10–12.

***Hausler v. J.P Morgan Bank, N.A*., 770 F.3d 207 (2d Cir. 2014)**

QUESTION: Whether § 201 of the Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610, ("TRIA") permits attachment of blocked Electronic Fund Transfers ("EFTs") pursuant to the Cuban Control Regulations, 31 C.F.R. § 515.311(a), in order to satisfy a state court judgment. *Id*. at 210.

ANALYSIS: The court found that because Congress did not define the types of property interests that may be subject to attachment under TRIA § 201(a), and because ETFs were not identified under Cuban Assets Control Regulations, 31 C.F.R. § 515.311(a), as "blocked assets," then the court must look to New York property law to fill the gap. *Id*. at 211–12. Relying on prior Second Circuit precedent, the court found that "under New York law 'EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.'" *Id*.

at 212. Thus, the court concluded that only the entity that passed the stopped EFT to the bank has a property interest. *Id*.

CONCLUSION: The 2nd Circuit held that, because no Cuban entity transmitted any of the blocked EFTs directly to the blocking bank, neither Cuba nor its agents or instrumentalities had any property interest in the EFTs blocked at the garnishee banks, and therefore, because no terrorist party had a property interest in the EFTs, they were not attachable under TRIA § 201. *Id*.

***Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014)**

QUESTION: What is the appropriate analysis for determining whether a claim under the Alien Tort Statute of 1789 ("ATS"), 28 U.S.C. § 1350, sufficiently "touches and concerns" the United States to displace the presumption against extraterritorial application of the ATS? *Id.* at 183.

ANALYSIS: The court first stated that the ATS is a strictly jurisdictional statute, which "must be narrowly read . . . to be kept within the confines of Article III." *Id.* at 178 (internal citation omitted) (internal quotation marks omitted). The court next recognized that the jurisdictional requirements that a party must meet to bring a claim under the ATS were as follows: "(1) the complaint pleads a violation of the law of nations; (2) the presumption against the extraterritorial application of the ATS . . . does not bar the claim; (3) customary international law recognizes liability for the defendant; and (4) the theory of liability alleged by plaintiffs (i.e., aiding and abetting, conspiracy) is recognized by customary international law." *Id.* (internal citations omitted).

CONCLUSION: The 2nd Circuit held that a plaintiff bringing a claim under the ATS can displace the presumption against extraterritoriality after satisfying a two-part test, by first, showing the alleged conduct touches and concerns the territory of the United States, and, second, by adequately stating a claim that the defendant committed the violation. *Id.*

***Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154 (2d Cir. 2014)**

QUESTION: Whether certain certificates are exempt from the Trust Indenture Act ("TIA") of 1939, under § 304(a)(2). *Id*. at 154.

ANALYSIS: The court recognized that § 304(a)(2) of the Trust Indenture Act of 1939, 15 U.S.C.S. §§ 77aaa-77bbbb, "exempts 'certificate[s] of interest or participation in two or more securities having substantially different rights and privileges.'" *Id*. at 158. The court found that, "[f]or a given instrument to be exempt from the TIA under § 304(a)(2), the instrument must "(1) be a 'certificate of interest or

participation' in (2) 'two or more securities' that (3) hav[e] substantially different rights and privileges.'" *Id*. at 165.

CONCLUSION: The 10th Circuit held that "certificates issued by the PSA-governed New York trusts are exempt from the TIA under § 304(a)(2)." *Id*. at 157.

THIRD CIRCUIT

***United States v. Solomon*, 766 F.3d 360 (3d Cir. 2014)**

QUESTION ONE: Whether a defendant may be charged for a more serious offense because the defendant thought that the bribe he or she had accepted was in furtherance of said offense. *Id.* at 361, 364.

ANALYSIS: The 3rd Circuit stated that the cross-reference provision of the United States Sentencing Guideline § 2C1.1(c)(1) provides that if a defendant has committed an offense in furtherance of a more serious offense, then the defendant may be sentenced under the guidelines for conspiracy of that more serious offense. *Id.* at 303. The court noted that the defendant need not have been charged with or committed the more serious offense in order to be sentenced for conspiracy of that more serious offense, the defendant need only have committed a crime in furtherance of that offense. *Id*. at 364. The court declared that for the cross-reference provision in the Guidelines to apply, "the defendant must accept payments for the purpose of facilitating the commission of another criminal offense." *Id*. at 367.

CONCLUSION: The 3rd Circuit concluded that if a defendant accepted a bribe in furtherance of a more serious crime, the defendant may be sentenced as if he had committed the more serious offense by virtue of the cross-reference provision in § 2C1.1(c)(1). I*d*. at 364.

QUESTION TWO: Whether a defendant may be sentenced to a two-level enhancement for an abuse of a position of trust despite the fact that he is already serving an enhanced sentence calculated under the cross-reference provision in §2C1.1 of the United States Sentencing Guidelines. *Id.* at 368.

ANALYSIS: The 3rd Circuit stated § 2C1.1 has an express provision, which demonstrates that if a defendant has been sentenced under § 2C1.1 then the enhancement for an abuse of position of trust shall not apply. *Id*. at 369. The Court determined that although a sentence may be enhanced under the cross-reference provision of § 2D1.1, the enhancement for abuse of a position of trust may not be added on so long as the defendant was originally convicted and sentenced under §2C1.1 of the United States Sentencing Guidelines. *Id*.

CONCLUSION: The 3rd Circuit concluded that if a defendant has been sentenced under § 2C1.1, despite having an enhanced sentence pursuant to § 2D1.1 of the United State Sentencing Guidelines, there is a prohibition on applying the enhancement for abuse of a position of trust as well. *Id*.

***United States v. Babaria*, 2014 U.S. App. LEXIS 24656 (3d Cir. Dec. 31, 2014)**

QUESTION: "[W]hether the medical director and manager of a Medicare and Medicaid provider who supervised the payment of kickbacks occupied a position of trust" for purposes of U.S.S.G. § 3B1.3 (2013). *Id.* at *1.

ANALYSIS: The court, in order to determine whether the defendant had a "position of trust" under § 3B1.3, considered "(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority to which the position vests in defendant vis-à-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position." *Id.* at *5. The court first reasoned that a physician who was the medical director and manager of a healthcare center, with no supervision, put him in a unique position to commit the crime. *Id.* at *6–7. The court next noted that the defendant physician "utilized his position as [the] medical director and manager to supervise and conceal the payments of kickbacks" and that this "level of authority and the lack of supervision over his actions enabled him to commit the offense and evade detection." *Id.* at *8–9.

CONCLUSION: The 3rd Circuit held that the medical director and manager who oversaw the kickback payments occupies a position of trust, and thus, the two level sentencing enhancement applies under §3B1.3. *Id.* at *1, *10.

***Watkins v. DineEquity, Inc.*, U.S. App. Lexis 21273 (3d Cir. Nov. 7, 2014)**

QUESTION: "[W]hether the omission of beverage prices from a restaurant menu falls within [the New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act's] prohibition against the inclusion of any provision in a covered writing that violates a legal right of a consumer or responsibility of a seller." *Id.* at *4.

ANALYSIS: The court conducted a plain reading of the underlying statute to determine that the phrase, "which includes any provision," indicated that the New Jersey legislature intended New Jersey's Truth-in Consumer Contract, Warrant and Notice Act ("TCCWNA") "to cover only the inclusion of illegal provisions, and not omissions." *Id.* at *8. The court

then noted that cases in which a seller engaged in fraudulent or duplicitous behavior, like charging different prices for a beverage in different parts of a restaurant, fell within the TCCWNA's prohibitions, and were thus distinguishable from the case at bar. *Id.* at *10–11.

CONCLUSION: The 3rd Circuit held that a mere omission of a beverage price on a menu was insufficient to show a violation of New Jersey's TCCWNA. *Id.* at *11–12.

FOURTH CIRCUIT

***E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509 (4th Cir. 2014)**

QUESTION: "Whether the [Individuals with Disabilities Act ("IDEA")] allows states to implement a two-tiered review process, when both tiers are administered at the state level." *Id*. at 524.

ANALYSIS: The court noted that the majority of courts that faced this issue have no problem with states implementing a two-tiered review process concentrated at the state level. *Id*. at 514. The court recognized that "the IDEA's exhaustion requirement serves the important purpose of allowing states to use their special expertise to resolve educational disputes." *Id*. Further, the court recognized that the Supreme Court concluded that the hearing provisions of the IDEA "contemplate that 'a state educational agency conduct the administrative review immediately preceding any civil action." *Id*. at 515. The court reasoned that North Carolina's "decision to add an additional level of review before the State Board of Education only enhances procedural protections for disabled students." *Id*.

CONCLUSION: The 4th Circuit held that the IDEA allows states to implement a two-tiered review process, when both tiers are administered at the state level." *Id*. at 511.

***United States v. Dowell*, 771 F.3d 162 (4th Cir. 2014)**

QUESTION: Whether the "vulnerable victim enhancement," U.S.S.G. § 3A1.1(b)(1), was improper where the district court already applied enhancements under U.S.S.G. §§ 2G2.1(b)(1)(A) and 2G2.2(b)(2) for a victim under the age of twelve. *Id.* at 171.

ANALYSIS: The court recognized that the vulnerable victim enhancement can be applied when the defendant "knew or should have known that the victim of the offense was a vulnerable victim." *Id.* The court noted, however, that § 3A1.1(b)(1) specifies that it should not be applied if the factor that makes the person vulnerable has already been incorporated into the offense guideline. *Id.* The court acknowledged that the 5th and 9th Circuits have allowed the vulnerable victim standard to be

applied in cases involving children younger than the victim involved in this case. *Id.* at 171–172. The court distinguished those decisions because the findings of "vulnerable victim" status in those cases rested on the fact that toddlers have traits such as the inability to walk or communicate which make them extremely vulnerable. *Id.* at 172.

CONCLUSION: The 4th Circuit held that, while there may be situations where a vulnerable victim enhancement can be applied to children under the age of twelve, it cannot be applied when the victim's characteristics that made her vulnerable were solely related to her age. *Id.* at 174.

***United States v. Ward*, 770 F.3d 1090 (4th Cir. 2014)**

QUESTION: Whether the holding in *Alleyne v. United States*, 133 S. Ct. 2151 (2013) applies in the context of a supervised release revocation hearing. *Id.* at 1096.

ANALYSIS: The court first noted that the Supreme Court in *Alleyene* extended earlier protections to require "that a jury determine beyond a reasonable doubt any fact requiring imposition of a mandatory minimum sentence." *Id.* at 1097. The court then distinguished *Alleyene's* protection in the context of supervised revocation hearings, and observed that revocation hearings are not considered part of a criminal prosecution. *Id*. The court further noted that the distinction between criminal proceedings and revocation hearings is significant, in that revocation hearings are less formal proceedings that do not deprive individuals of their "absolute liberty." *Id.* at 1098.

CONCLUSION: The 4th Circuit held that the constitutional protections the Court afforded in *Alleyne* do not apply in the context of supervised revocation hearings. *Id.* at 1092.

FIFTH CIRCUIT

***Cisneros-Guerrerro v. Holder*, 2014 U.S. App. LEXIS 24525 (5th Cir. Dec. 29, 2014)**

QUESTION: Whether an alien's criminal offense of public-lewdness under Texas Penal Code § 21.07 was a crime involving moral turpitude, thus barring him from cancellation of removal. *Id.* at *3.

ANALYSIS: The court noted that the Attorney General "may cancel removal of, and adjust the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States[.]" *Id*. The court further noted that for an alien who has been convicted of "a crime involving moral turpitude," the alien is ineligible for cancelation removal. *Id.* at *4. The court recognized that a

two-part test must be utilized to determine whether such an offense is a crime involving moral turpitude: first, the court must assess "whether the minimum reading of the statute necessarily reaches only offenses involving moral turpitude, and, of not, then the court proceeds to determine whether "the statute has multiple subsections or an element phrased in the disjunctive, such that some violations of the statute would involve moral turpitude and others not." *Id.* at *5–6 (internal quotation marks omitted). The court concluded that if this two-part test is met, the court must look to "the record of conviction to determine whether the alien was convicted under a part of the statute that describes a crime involving moral turpitude." *Id.*

CONCLUSION: After applying the two-step approach, the 5th Circuit held that the public lewdness statute §21.07 is not categorically labeled as crime involving moral turpitude. *Id.* at *10–11.

***Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir. 2014)**

QUESTION: Whether the Sarbanes-Oxley Act's (SOX) whistleblower retaliation provision, 18 U.S.C. § 1514A(c)(2), allows for noneconomic compensatory damages. *Id.* at 263.

ANALYSIS: The court noted that the SOX states that an employee who prevails on an anti-retaliation claim is entitled to "all relief necessary to make the employee whole," which "shall include" reinstatement, back pay, and certain "special damages." *Id.* at 263–64. The court recognized that the 10th Circuit has held that SOX allows for noneconomic compensatory damages, however, the opinion offered "scarce reasoning." *Id.* at 264. The court read the word "include" as non-exhaustive, and said that relief necessary to make an employee whole may be broader in scope than the three enumerated forms of relief included in the statute. *Id.* at 264. The court reasoned that SOX's language is comparable to that of the False Claims Act's anti-retaliation provision, which also states that employees "shall be entitled to the relief necessary to make [them] whole." *Id.* at 265.

CONCLUSION: The 5th Circuit held that SOX affords "all relief necessary to make the employee whole," and thus allows for noneconomic compensatory damages including emotional distress and reputational harm. *Id.*

***MM Steel, L.P. v. JSW Steel (USA), Inc.*, 771 F.3d 301 (5th Cir. 2014)**

QUESTION: Whether, for purposes of Fed. R. Civ. P. 62(f), "a judgment is a lien on the judgment debtor's property under Texas law" *Id.* at 303 (internal quotation marks omitted).

ANALYSIS: The 5th Circuit first noted that Rule 62(f) provides the ability for the judgment debtor to benefit from the state court stay of execution of a judgment if, "under the state law where the court is located" the judgment would be considered a lien on the property of the judgment debtor." *Id.* The Court observed that the purpose of Rule 62(f) is to give as much deference as possible to state's desire to permit someone to appeal a judgment without putting up a bond. *Id*. The court recognized that Texas procedures demand substantial compliance with the filing requirements of an abstract of judgment that "contains seven elements not necessarily contained in the judgment," requires the creditor to oversee the whole process, including making that sure that the clerk "abstracts the judgment properly," and can be thwarted by posting of a bond by the judgment debtor. *Id.* at 304–06. Thus, the Court determined that this process is "more than mere ministerial acts." *Id*. at 306.

CONCLUSION: The 5th Circuit held that a judgment in the state of State of Texas is not a lien that falls under Rule 62(f). *Id.*

***United States v. King*, 773 F.3d 48 (5th Cir. 2014)**

QUESTION: Whether "declining to apply the safety valve based on a judicially-determined fact is unconstitutional under *Alleyne v. United States*, 133 S. Ct. 2151 (2013)." *Id*. at 55.

ANALYSIS: The court first noted that *Alleyne* held that "any fact that increases a statutory mandatory minimum sentence must be found by a jury beyond a reasonable doubt." *Id*. The court further noted that the safety valve statute "provides that a defendant who qualifies for the safety valve shall be sentenced without regard to a statutory mandatory minimum sentence." *Id.*

The court also stated that the 1st, 9th, 10th, and 11th Circuits have "found that *Alleyne* does not preclude judicial factfinding for safety valve determinations." *Id*.

CONCLUSION: The Eight Circuit held that "it is not constitutional error for a judge to find facts that render the safety valve inapplicable." *Id*.

***United States v. Ozorto*, 772 F.3d 1053 (5th Cir. 2014).**

QUESTION: "[W]here a criminal defendant who has plead guilty signs a statement indicating that he wishes to appeal only his sentence, and where the defendant's appellate counsel files an *Anders* brief addressing only issues related to sentencing, may the defendant raise issues related to his guilty plea and conviction in response to the *Anders* brief?" *Id*. at 1054.

ANALYSIS: The court first noted that the 5th Circuit has previously held that counsel does not have to "file a transcript and brief the issues

surrounding [a defendant's guilty] plea in an *Anders* brief where the record reflects that the defendant has chosen not to challenge the plea." *Id*. (internal quotation marks omitted). The court further noted that this 5th Circuit precedent does not directly address the situation presented here, and that it was inclined to adopt a rule that "follows from general waiver principles." *Id*. at 1055. The court found that if a defendant can "later broaden the scope of his appeal in contradiction of his prior expressed intent," this would "create the possibility of two rounds of *Anders* briefing–one addressing the issues the defendant initially indicates he wants to challenge, and another addressing any additional issues raised in response to the first *Anders* brief." *Id.*

CONCLUSION: The 5th Circuit held that "where a defendant provides sufficient indication . . . that he intends to challenge only his sentence, the defendant may not revoke that decision after counsel has filed an *Anders* brief permitting any discussion of a defendant's guilty plea." *Id*. at 1054.

***United States v. Rodriguez-Rodriguez*, 2015 U.S. App. LEXIS 24 (5th Cir. Jan. 2, 2015)**

QUESTION: Whether a conviction under Texas Penal Code § 42.072, the "Texas Stalking Statute", is a "crime of violence." *Id.* at *6.

ANALYSIS: The court consulted U.S.S.G. § 2L1.2 n1(B)(iii) for a definition of "crime of violence" and noted that there must be an element of threat, attempted use or use of physical force against another to qualify as a crime of violence. *Id.* at *6. The court next analyzed what the use of force means according to case, and noted that "a defendant uses force if he intentionally avails[s] himself of that force." *Id.* The court further determined that only enumerated or force offenses can be defined as crimes of violence, and that stalking must be a force offense in order to qualify, as it is not an enumerated offense. *Id.* The court reasoned that the elements of the offense in the conviction statute – and not the defendant's conduct – determine whether a crime is a force offense. *Id.*

CONCLUSION: The 5th Circuit thus held that a conviction under the Texas Stalking Statute, when considered in the light of a charging indictment that does not refer to the threat, attempted use, or use of physical force, does not constitute a crime of violence under § 2L1.2 n1(B)(iii). *Id.* at *10.

***Wooten v. McDonald Transit Assocs.*, 775 F.3d 689 (5th Cir. 2015)**

QUESTION: Whether "fatally defective pleadings [may] be corrected by proof taken at a default-judgment hearing." *Id.* at 695.

ANALYSIS: The court first recognized that Fed. R. Civ. P. 55(b)(2) "authorizes a court considering an application for default judgment to

"conduct hearings . . . when, to enter or effectuate judgment," it needs to, *inter alia*, "establish the truth of any allegation by evidence . . . or . . . investigate any other matter," but that no courts have held that "such a hearing would be appropriate to adduce facts necessary to state a claim that were absent from the pleading on which judgment was sought." *Id*. at 699. The court next noted that none of its sister circuits had yet addressed the precise issue before the court, but that "precedents agree on the basic proposition that a default judgment must be founded on adequate pleadings." *Id*. Lastly, the court noted that a rule that would permit a party "to cure facially deficient pleadings through evidence introduced at a damages hearing would disturb the careful compromise [its] cases have struck between fairness, finality, and justice." *Id*. at 701.

CONCLUSION: The 5th Circuit held that "a defective complaint cannot be redeemed by evidence presented at a prove-up hearing and therefore cannot support a default judgment absent amendment of the pleadings." *Id*. at 699.

SIXTH CIRCUIT

***Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399 (6th Cir. 2014)**

QUESTION: Whether a 15 U.S.C. § 36(a) of the Investment Company Act ("ICA") provides a private right of action. *Id.* at 406.

ANALYSIS: The 6th Circuit first found that the text of the ICA does not indicate "an intent by congress to create a private right of action under Section 36(a)." *Id.* at 408. The court found that, instead, the ICA's first sentence stating "the commission is authorized to bring an action . . . " does not contain any rights creating-language and is further bolstered by the language in § 42 of the statute that "empower[s] the Securities and Exchange Commission to enforce all ICA provisions." *Id.* (internal quotation marks omitted). Next, the court noted that the amendment to § 36(b) adds a private right of action, and thus "strongly implies the absence of [a private right of action] in Section (36)(a)." *Id.*. Finally, the Court noted that "the post-enactment legislative history relied upon [to prove that a private right of action exists] has little probative value because a post-enactment legislative body has no special insight regarding the intent of a past legislative body." *Id.* at 409.

CONCLUSION: The 6th Circuit held that 15 U.S.C. § 36(a) does not provide a private right of action. *Id.* at 406.

***Navistar, Inc. v. Forester*, 767 F.3d 638 (6th Cir. 2014)**

QUESTION: Whether a federal coal mine inspector qualifies as a coal miner for purposes of "the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901–944, as amended by § 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010)." *Id.* at 640.

ANALYSIS: The court began its analysis by setting forth the elements that must be proven in order for a coal miner to receive benefits under the BLBA: "(1) he has pneumoconiosis; (2) his pneumoconiosis arose at least in part out of his coal mine employment; (3) he is totally disabled; and (4) the total disability is due to pneumoconiosis." *Id.* at 640. The court noted that in order to meet the definition of a coal miner under the BLBA a person must pass a two part test in which he must show that he "worked in or around a statutorily defined coal mine" and his "duties involved the extraction or preparation of coal, or involved appropriate coal mine construction or transportation" *Id*. at 641. The court posited that, unlike private coal mine inspectors that companies hire to inspect their mines and repair issues, federal coal mine inspectors serve "a purely regulatory function . . . not involved in the day-to-day overall operation of any particular mine;" therefore their functions cannot be considered "integral" or "necessary." *Id.* at 646.

CONCLUSION: The 6th Circuit held that "federal mine inspectors are not 'miners' for purposes of the BLBA." *Id.* at 647.

Stratton v. Portfolio Recovery Assocs., LLC, **770 F.3d 443 (6th Cir. 2014)**

QUESTION: Whether the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692(e), prohibits a party from collecting statutory interest if it has waived its right to collect contractual interest? *Id.* at 445.

ANALYSIS: The court posited that a party who contracts to collect a particular interest rate has "bargained away" the right to collect the statutory interest rate that would apply in the absence of the contract. *Id.* at 448. The court further noted that a debt collector, as a creditor's assignee, was bound by the creditor's waiver of the right to collect the statutory interest rate. *Id.* The court then observed that the FDCPA must be construed broadly, and that it applies to efforts to collect a debt through litigation. *Id.* at 449. The court remarked that, under the FDCPA, a lawsuit to collect statutory interest that had been waived by an agreement to collect contractual interest is an attempt to recover a debt to which the creditor has no legal right. *Id.* at 451

CONCLUSION: The 6th Circuit held that a party's lawsuit to collect statutory interest after waiving its right to collect contractual interest violates the FDCPA. *Id.* at 452.

***United States v. Smith*, 582 Fed. App'x 590 (6th Cir. 2014)**

QUESTION: Whether common-law robbery would be considered a crime of violence under North Carolina law. *Id*. at 594.

ANALYSIS: The court noted that the definition of common-law robbery, pursuant to North Carolina law, is "the felonious, non-consenual taking of money or personal property from the person or presence of another *by means of violence or fear*." *Id*. The court further stated that only violence or fear must be proven in order for a conviction to stand for common law robbery. *Id*. The court determined that because the elements of common-law robbery come under the physical force clause found in at U.S.S.G. § 4B1.2, it involves an element of physical force against another person. *Id*. at 595.

CONCLUSION: The 6th Circuit held that a common-law robbery in North Carolina constitutes a crime of violence because it comports with the residual clause of U.S.S.G. § 4B1.2. *Id*. at 601.

SEVENTH CIRCUIT

***Cirilli v. Bronk (In re Bronk*), 775 F.3d (7th Cir. 2015)**

QUESTION ONE: Whether state college savings accounts were exempt by creditors under Wis. Stat. § 815.18(3)(p) "because account owners, not just account beneficiaries, could claim the exemption." *Id*. at 872.

ANALYSIS: The court first noted that, while Wisconsin's exemption statute "allows debtors to exempt an interest in a college savings account . . . from execution by creditors," the term "interest" is never specifically defined in any statute or regulation. *Id*. at 875. (internal quotation marks omitted). The court, after analyzing the relevant Wisconsin statutes, noted that "the general exemption statute is succinct and straightforward," and concluded that "[a] debtor may exempt 'an interest in a college savings account . . . from execution by creditors." *Id*. at 876.

CONCLUSION: The 7th Circuit held that "§815.18(3)(p) applies to an account owner's interest in a . . . college savings account." *Id*.

QUESTION TWO: Whether an annuity is a retirement benefit and qualifies to be exempt in full under Wis. Stat. § 815.18(3)(j). *Id*. at *3.

ANALYSIS: The court first noted that the statute defines "annuity" as "a series of payments payable during the life of the annuitant or during a

specific period." *Id*. at 877. The court noted that, to qualify for full exemption, a "retirement plan or contract must meet one of two additional requirements: (1) it must be employer sponsored; or (2) it must comply with the Internal Revenue Code." *Id.* The court noted that, to qualify for a full exemption under § 815.18(3)(j), "an annuity must distribute benefits *because of* or *conditioned on* age, illness, disability, death, or length of service." *Id*. The court reasoned that, because the annuity contained a death benefit, this feature brought "it under the umbrella of § 815.18(3)(j)." *Id*. at 878.

CONCLUSION: The 7th Circuit held that, for an annuity, a debtor may "exempt [an annuity] in full under § 815.18.(3)(j) if it was employer sponsored or complied with the Internal Revenue Code." *Id*.

EIGHTH CIRCUIT

***Alexander v. Avera St. Luke's Hosp*., 768 F.3d 756 (8th Cir. 2014)**

QUESTION: Whether Family and Medical Leave Act (FMLA)] claims involving employees should be governed by a six-factor "economic realities" test, rather than the "common-law agency principle" articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. (1992). *Id*. at 763.

ANALYSIS: The court first noted that before *Darden,* most federal circuit courts employed a test for determining employee status under the FMLA that fused the "common-law test and the economic realities test." *Id*. at 763–64. However, the court noted that *Darden* did not prevent federal circuit courts from continuing to use their own hybrid tests; in fact, the *Darden* test differed in no significant way from the circuit courts' hybridized tests. *Id*. at 764. The court concluded that the six-factor test is unnecessary and should not govern FMLA claims because the 8th Circuit's hybrid test already "expressly takes into account 'economic realities.'" *Id*.

CONCLUSION: The 8th Circuit held that the "hybrid test . . . [,] [which is] governed by *Darden*[,]" controls definitions of employees under the FMLA. *Id*.

***United States v. Henley*, 766 F.3d 893 (8th Cir. 2014)**

QUESTION: Whether a wiretap order failed to comply with the "jurisdictional requirement" of 18 U.S.C. § 2518(3), because "the target phone of the wiretap was based in Chicago during the entire course of the government's investigation," and Chicago was "outside the 'territorial jurisdiction' of the Eastern District of Missouri." *Id*. at 911.

ANALYSIS: The court first noted that the 2nd Circuit had previously held that "for purposes of § 2518(3)'s jurisdictional requirement, a communication is intercepted not only where the tapped telephone is located, but also where the contents of the redirected communication are first to be heard." *Id*. The court found it persuasive that the 5th and 9th Circuit's agreed with the 2nd Circuit's conclusion, and stated that these courts concluded "that interception includes both the location of a tapped telephone and the original listening post, and that judges in either jurisdiction have authority . . . to issue wiretap orders." *Id*.

CONCLUSION: The 8th Circuit agreed with the 2nd, 5th, and 9th Circuits, and held that a "judge sitting in the Eastern District of Missouri had jurisdiction to authorize the wiretap." *Id*. at 912.

NINTH CIRCUIT

***Becker v. Williams*, 2015 U.S. App. LEXIS 1554 (9th Cir. Jan. 28, 2015)**

QUESTION: "Whether the category of 'documents and instruments governing the plan' described in § 1104(a)(1)(D) included beneficiary designation forms." *Id.* at 8.

ANALYSIS: The court first started by examining a similar provision, 29 U.S.C. §1 024(b)(4), which states that plan administers must provide a requesting party "with a copy of various plan documents, including SPDs, annual reports, terminal reports, bargaining agreements, trust agreements, contracts and 'other instruments under which the plan is established or operated.'" *Id.* at 8–9. The court determined that the "other instruments" category was limited to those "similar in nature" to the documents specifically mentioned in § 1024(b)(4). *Id.* at 9–10. The court, finding that § 1024(b)(4)'s "other instruments" category overlaps with § 1104(a)(1)(D)'s "documents and instruments governing the plan," concluded that governing plan documents only includes those plans that provide "information as to 'where the participant stands with respect to the plan.'" *Id.* at 10.

CONCLUSION: The 9th Circuit held that beneficiary designation forms do not constitute, or "were in any way incorporated into, governing plan documents." *Id.* at 12.

***Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2014)**

QUESTION: Whether "petitions to coordinate actions under California Code of Civil Procedure § 404 constitute[s] proposals for these actions to be tried jointly, making the actions a 'mass action' subject to federal jurisdiction under the [Class Action Fairness Act of 2005 (CAFA)]." *Id.* at 1222.

ANALYSIS: The 9th Circuit reasoned that some claimants have tried structuring their complaints under § 404 in order to circumvent the 100-plaintiff threshold under the CAFA, and remain in state court. *Id.* at 1223. The court also noted that claimants are the masters of their complaints and petitions for coordination, and they will be held responsible for what they have stated and done. *Id.* The court further reasoned that invoking CAFA does not require an express request for a joint trial "in order to be a proposal to try the cases jointly." *Id.* at 1225.

CONCLUSION: The 9th Circuit held that, under § 404, an assessment of the language used in a claimant's memoranda in support of their petitions for coordination will determine whether a proposal for a joint trial was made. *Id.* at 1223.

***Black Mesa Water Coalition v. Jewell*, 2015 U.S. App. LEXIS 1182 (9th Cir. 2015)**

QUESTION: Whether the Surface Mining Control and Reclamation Act's (SMCRA) fee "eligibility" determinations are subject to *de novo* review and "entitlement" determinations for abuse of discretion. *Id.* at *7.

ANALYSIS: The court noted that the 4th Circuit determined that agency decisions under the "eligibility" prong of its fee award regulation are subject to *de novo* review because "whether a party achieved some degree of success on the merits is an interpretation based on general common law principles and not on expertise in the agency's particular field." *Id.* at *8. The court further noted that the 4th Circuit determined that "entitlement" determinations are factual findings made by the agency. *Id.* at *10.

CONCLUSION: The 11th Circuit joined the 4th Circuit in holding that an agency's "eligibility" determination is subject to *de novo* review and its "entitlement" determination is subject to the substantial evidence standard. *Id.*

***EEOC v. Peabody Western Coal Co.*, 768 F.3d 962 (9th Cir. 2014)**

QUESTION: "Whether Title VII's prohibition against national origin discrimination prohibits the tribal hiring preferences in the mineral leases." *Id.* at 971.

ANALYSIS: The court first reviewed the legislative history of Title VII, and found that Title VII prohibits "discrimination in employment on the grounds of race, color, religion, sex, or national origin." *Id.* at 968–69. The court further found that § 703(i) of Title VII "does not itself authorize or create an exemption for tribal hiring preferences on or near Indian reservations . . . ." *Id.* at 969–70. The court noted that Title VII provided two provisions that concerned Indians: The first was an exclusion

of "tribal governments from definition of employer" and the second being "a general exemption from Title VII for preferential hiring of Indians." *Id.* at 972. The court concluded that the "Indian preference exemption expressly permits the preferential hiring" of Indians. *Id.*

CONCLUSION: The 9th Circuit held that tribal affiliation is a political classification and that "Title VII does not prohibit differential treatment based on this political classification." *Id.* at 967.

***Hughes v. United States*, 770 F.3d 814 (9th Cir. 2014)**

QUESTION: Whether *Alleyne v. United States*, 133 S. Ct. 2151 (2013), created a rule that can be applied retroactively on collateral review according to 28 U.S.C. § 2244 (b) and § 2255 (h). *Id*. at 815.

ANALYSIS: The 9th Circuit reasoned that the Supreme Court had set the bar high regarding when the retroactive application of a newly articulated rule. *Id*. at 817. The court noted that there are two ways that a new rule can be applied to a previous case: (1) the Supreme Court expressly announces that the rule of a case applies retroactively, or (2) through multiple holdings. *Id*. The court found that, absent these two circumstances, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id*. The court stated that a rule of criminal procedure, such as the rule in the present case, would only apply retroactively if there were fundamental issues of fairness and accuracy in the criminal proceeding that were implicated and "the likelihood of an accurate conviction is *seriously* diminished." *Id*. at 817–18.

CONCLUSION: The 9th Circuit held that the Supreme Court had not made *Alleyne* retroactive to cases that were on collateral review. *Id*. at 815.

***Shirk v. United States ex rel. Dept. of Interior*, 773 F.3d 999 (9th Cir. 2014)**

QUESTION: Whether the United States may be held liable under the Federal Tort Claims Act ("FTCA") for the off-reservation actions of two tribal police officers." *Id*. at 1000.

ANALYSIS: The court began by noting that, after Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA") it "extended the FTCA's waiver of sovereign immunity to claims 'resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by [§ 314 of the ISDEAA], as amended." *Id*. at 1003. The court determined that § 314 "requires courts to determine whether, under state law, an employee's allegedly tortious action falls within the scope of his employment," and

also requires a finding that the employee was "carrying out the contract or agreement." *Id*. at 1005. The court articulated that, when putting these two requirements together, an employee's conduct will be covered by the FTCA if, "while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law." *Id*. at 1005–06.

CONCLUSION: The 9th Circuit held that, in order for the officers' conduct to fall within the ambit of § 314 of the ISDEAA, the plaintiff must first prove that the a contract existed between the BIA and the tribe and that this contract covers the conduct, and second, that the acts fall within the employee's scope of employment according to state law. *Id.* at 1006.

***United States v. Johnson*, 767 F.3d 815 (9th Cir. 2014)**

QUESTION: "Whether proof of the defendant's responsibility for the witness's absence must be shown by a preponderance of the evidence, as provided by Rule 804(b)(6) of the Federal Rules of Evidence," or by the clear and convincing evidence standard, as it pertains to the "so-called 'forfeiture exception' to the Confrontation Clause of the Sixth Amendment." *Id.* at 817–18.

ANALYSIS: The court first noted that the "forfeiture exception" applies "when the defendant is responsible for the witness being unavailable." *Id.* The court then looked to how other circuits have ruled, and found that, according to the 9th Circuit, other circuit courts addressing the forfeiture exception continue to apply the preponderance of the evidence standard. *Id.* The court specifically noted that the 2nd Circuit held the "forfeiture exception is governed by the preponderance standard[.]" *Id*. The court also considered a 4th Circuit holding, which stated that "the forfeiture exception should be read broadly in order to prevent defendants from undermining the integrity of the judicial process." *Id*.

CONCLUSION: The 9th Circuit held that "in order to introduce evidence under the forfeiture exception, the Government must demonstrate by a preponderance of the evidence that the defendant intentionally secured the declarant's absence." *Id*. at 822–23.

***United States v. Reyes Vera*, 770 F.3d 1232 (9th Cir. 2014)**

QUESTION: "What is the appropriate remedy when a jury finds beyond a reasonable doubt facts that increase a defendant's statutory sentencing range, but the jury's finding was affected by trial error?" *Id*. at 1249.

ANALYSIS: The 9th Circuit specifically considered whether it must "(1) vacate the entire conspiracy conviction and remand for a full

retrial . . . ; (2) vacate only the drug quantity findings in the special verdict, deny the government the option of retrying the drug quantity issue and require resentencing based solely on the defendants' convictions; or (3) vacate only the drug quantity findings in the special verdict, but allow the government to resubmit the drug quantity questions to a sentencing jury. *Id*. The court first looked to relevant case law to find that vacating the jury's findings on one portion of the trial did not require the whole conviction to be vacated because the affected portion of the verdict was not an element of the offense charged. *Id*. at 1249. Instead, as the court noted, the tainted portion of the verdict was "the functional equivalent of an element" that was separately submitted to a jury for a finding of proof beyond a reasonable doubt for the single purpose of sentencing. *Id*. Further, the court stated that the Double Jeopardy Clause does not preclude a retrial of an issue related to the tainted verdict, as it applies to insufficient evidence and not to trial error. *Id*. at 1250. The court distinguished its holding from those of the 1st and 4th Circuits, which relate to the tainted drug quantity verdicts which had been part of the underlying conspiracy charges. *Id*. at 1252.

CONCLUSION: The 9th Circuit held that the appropriate remedy for such cases is to vacate the findings in the special verdict and allow the government to resubmit the questions to a sentencing jury. *Id*. at 1249.

TENTH CIRCUIT

***Barnes v. United States*, 2015 U.S. App. LEXIS 876 (10th Cir. Jan. 21, 2015)**

QUESTION: How the Federal Tort Claim Act's ("FTCA") administrative-exhaustion requirement, 28 U.S.C. § 2675(a), relates to the statute of limitations set forth in 28 U.S.C. § 2401(b) . *Id.* at *9.

ANALYSIS: The court first noted that § 2675(a) specifies that a plaintiff must "have their administrative claims finally denied by the relevant federal agency," or "if the agency fails to act on their administrative claims within six months of presentment, they may thereafter deemed the claims (constructively) denied." *Id.* The court further noted that § 2401(b) bars a tort claim unless "action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." *Id.* The court recognized that the 6th and 9th Circuits have considered the interplay between § 2675(a) and § 2401(b), and concluded that an "administrative-exhaustion requirement that dictates when a potential plaintiff's

opportunity to initiate claims begins [] has no bearing on the point at which that opportunity ceases." *Id.* at *16.

CONCLUSION: The 10th Circuit held that the administrative-exhaustion requirement's "deemed denial" provision constitutes a "final denial" only for purposes of determining whether it is too early to file a claim. *Id.* at *16.

***Kane Cnty., Utah v. United States,* 772 F.3d 1205 (10th Cir. 2014)**

QUESTION: Whether a plaintiff must satisfy the "disputed title" element of the Quiet Title Act by showing an expressed dispute or if action that implicitly disputes the title is enough. *Id.* at 1211.

ANALYSIS: The court noted that the Quiet Title Act allows for claims to challenge the United States' claim to real property. *Id.* at 1210. The court cited to their established rule "that waivers of sovereign immunity [as seen in the present case] are to be read narrowly." *Id* at 1211. The court attempted to bar claims that simply create ambiguity regarding the plaintiff's title. *Id*. at 1212. The court stressed the reality of parties settling their disputes amongst themselves before turning to the court. *Id*.

CONCLUSION: The 10th Circuit held that to satisfy the "disputed title" element of the Quiet Title Act, the plaintiff must show an expressed dispute of the title. *Id*.

***Mallo v. IRS (In re Mallo)*, 2014 U.S. App. LEXIS 24560 (10th Cir. Dec. 29, 2014)**

QUESTION: "[W]hether an untimely 1040 Form, filed after the Internal Revenue Service (IRS) has assessed the tax liability, is a tax return for purposes of the exceptions to discharge in [11 U.S.C] § 523(a)(1)(B)(i) of the Bankruptcy Code." *Id*. at *1.

ANALYSIS: The court first examined the language of the Bankruptcy Code statute, and noted that. § 523(a)(1)(B)(i) provides that "a debtor's tax liabilities 'with respect to which a return . . . was not filed' are excepted from discharge." *Id*. The court recognized that "the hanging paragraph added by Congress in 2005 defines return as a document that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." *Id*. at *14. (internal quotation marks omitted). The court further noted that the 5th Circuit had previously held that the applicable filing requirements for state returns included the filing deadline. *Id*. at *16.

CONCLUSION: The 10th Circuit held that an untimely filed tax form "cannot constitute a 'return' for the purposes of dischargeability because the due date is an 'applicable filing requirement.'" *Id*. at *17.

***Tennille v. West Union Co.*, 774 F.3d 1249 (10th Cir. 2014)**

QUESTION: "[W]hether an appeal bond can, as a matter of law, cover the cost of notifying class members of Objectors' merits appeals and the cost of maintaining the settlement pending those appeals." *Id.* at 1254.

ANALYSIS: The court noted that Fed. R. App. P. 7 allows the district courts to require appellants to file a bond "in any form and amount necessary to ensure payment of costs on appeal." *Id.* The court stated that other circuit courts have consistently defined "costs on appeal" as costs an appellant can recover "pursuant to a specific rule or statute." *Id.* at 1254. The court noted that the while circuit courts disagree as to what "costs a Rule 7 appeal bond can cover," the circuits are in agreement that "costs on appeal" is consistently defined for Rule 7 purposes "as appellate costs expressly provided for by a rule or statute." *Id*.

CONCLUSION: The 10th Circuit held that, "[b]ecause Plaintiffs have not identified any rule or statute that allows them to recover, as costs on appeal, funds spent either notifying class members of Objectors' merits appeals or maintaining the settlement pending those appeals, the district court erred in imposing a Rule 7 appeal bond that included those costs." *Id.* at 1256.

***United States v. Powers*, 578 Fed. App'x 763 (10th Cir. 2014)**

QUESTION: Whether the applicable definition of "participants" in a fraudulent scheme, as it pertains to U.S.S.G. § 2B1.1(b)(14)(A) should coincide with the definition of "participant" set forth in comment note 1 of U.S.S.G. § 3B1.1, and "ask whether an individual was a 'participant' in the 'relevant conduct' as defined in U.S.S.G. § 1B1.3(a)(1)(B)." *Id.* at 780.

ANALYSIS: The 10th Circuit first noted "the commentary to [U.S.S.G. § 2B1.1(b)(14)(A)] explains 'the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.'" *Id.* The court then clarified that "district courts identifying 'participants' in a fraud for purposes of U.S.S.G. § 2B1.1(b)(14)(A) should employ the definition of 'participant' set forth in U.S.S.G. § 3B1.1 cmt. n.1 and ask whether an individual was a 'participant' in the 'relevant conduct' as defined in U.S.S.G. § 1B1.3(a)(1)(B)." *Id*. The Court lastly noted that identical words used in different parts of the same act are intended to have the same meaning, and in § 3B1, the advisory committee defined 'participant' as "a person who is criminally responsible for the

commission of the offense, but need not have been convicted, while a person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant." *Id*. at 781–82.

CONCLUSION: The 10th Circuit held that "'participants' for purposes of the gross-receipts enhancement of U.S.S.G. § 2B1.1 should be read consistently with the role-in-the-offense definition of the essentially identical term in the commentary to U.S.S.G. § 3B1.1." *Id*. at 782.

ELEVENTH CIRCUIT

***Collins v. Experian Info. Solutions, Inc.*, 2015 U.S. App. LEXIS 50 (11th Cir. Jan. 5, 2015)**

QUESTION: Whether an alleged violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 168i (a), which requires a consumer reporting agency to conduct a "reasonable reinvestigation" of disputed consumer credit information, must be disclosed to a third party for a consumer to recover actual damages. *Id.* at *2.

ANALYSIS: The court first looked at the plain meaning of the statute to differentiate between portions of the statute concerning consumer credit reports and files, noting that there is no requirement for communication to a third party when a consumer notifies the agency that there is a dispute concerning his file. *Id.* at *12. The court further considered Congressional intent and cited case law to note that "Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Id.* at *6. The court reasoned that under the FCRA there is a private right of action against consumer reporting agencies for any willful or negligent violation of the statute under sections 15 U.S.C. §§ 1681o and 1681n. *Id.*

CONCLUSION: The 11th Circuit held that publication to a third party of a consumer's credit file was not needed for a consumer to recover actual damages under 15 U.S.C. § 168i (a). *Id.* at *13.

***Davila v. Gladden*, 777 F.3d 1198 (11th Cir. 2015)**

QUESTION: Whether the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, authorizes suits for money damages against officers in their official capacities. *Id.* at 1290.

ANALYSIS: The court first addressed whether "Congress authorized suits for money damages against officers in their official capacities when it passed the RFRA." *Id*. The court noted that "Congress must clearly waive the federal government's sovereign immunity," but this does not mean that Congress must utilize "specific language, and the sovereign immunity canon . . . does not displace the other traditional tools of stator

construction." *Id*. (internal quotation marks omitted). The court found it persuasive that that the Supreme Court had previously held that "identical 'appropriate relief' language in the related [Religious Land Use and Institutionalized Persons Act] did not waive states' sovereign immunity for money damages." *Id*. Lastly, the court noted that the only two circuit courts to decide this issue, the 9th and D.C. Circuits, held that Congress did not waive sovereign immunity in this context. *Id*.

CONCLUSION: The 11th Circuit held that "Congress did not unequivocally waive its sovereign immunity in passing the RFRA," and thus, the RFRA does not authorize "suits for money damages against officers in their official capacities." *Id*. at 1210.

***Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225 (11th Cir. 2014)**

QUESTION: "Whether a [cruise ship] passenger might invoke the principles of actual agency, or those of apparent agency, to impute to a cruise line liability for the medical negligence of its onboard nurse and doctor. *Id*. at 1228.

ANALYSIS: The 11th Circuit recently emphasized that issues of vicarious liability raise factual questions. *Id.* Further, the court found that there is no reason to "carve out a special exemption for all acts of onboard medical negligence." *Id*. The court specifically stated that the issue of whether an agency relationship exists "is a question of fact under the general maritime law." *Id*. at 1235–36. The court declined to adopt old rule regarding negligence aboard a ship which stated that "shipowners cannot control onboard medical personnel because the doctor-patient . . . relationship 'is under the control of the passengers themselves," reasoning that the old rule has not adapted to the "evolution of legal norms." *Id*. at 1228, 1241. T

CONCLUSION: The 11th Circuit held that courts must conduct a case by case analysis under maritime law in order to determine whether or not actual or apparent agency exists. *Id*. at 1241.

***Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698 (11th Cir. 2014)**

QUESTION ONE: "Whether an individual plaintiff's claim becomes moot when the plaintiff does not accept a Rule 68 offer of judgment that, if accepted, would provide all the relief the plaintiff seeks." *Id*. at 702.

ANALYSIS: The court first analyzed Fed. R. Civ. P. 68, and then looked to the dissent in *Genesis Healthcare Corp. v. Symczk*, 133 S. Ct. 1523 (2013), which stated that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot," and the case is moot "only when it is impossible for a court to grant

any effectual relief whatever to the prevailing party." *Id*. at 702-03. The court noted that this proposition does not change even though a party rejected a settlement offer. *Id*. at 703.

CONCLUSION: The 11th Circuit held that individual claims are not moot even after the plaintiff fails to accept a Rule 68 offer. *Id*. at 704.

QUESTION TWO: "[W]hether, if the answer is yes and such offers are made to all the named plaintiffs in a proposed class action before they move to certify a class, the named plaintiffs may nonetheless go forward as class representatives." *Id*. at 702.

ANALYSIS: The court started its analysis by stating "the necessary personal stake in a live class-action controversy sometimes is present even when the named plaintiff's own individual claim has become moot." *Id*. at 705. The court noted that the "legal status of class members' changes not when a motion to certify is filed but when a certification order is entered." *Id*. at 707. The court further posited that "the relation-back doctrine allows a named plaintiff whose individual claims are moot to represent class members not because the named plaintiff has moved to certify a class but because the named plaintiff will adequately present the class claims and unless the named plaintiff is allowed to do so the class claims will be capable of repetition, yet evading review." *Id*. at 707.

CONCLUSION: The 11th Circuit held that "even if the individual claims are somehow deemed moot, the class claims remain live, and the named plaintiffs retain the ability to pursue them." *Id*. at 704.

***United States v. Mathis,* 767 F.3d 1264 (11th Cir. 2014)**

QUESTION: "[W]hether a cell phone is a "computer" within the meaning of [18 U.S.C.] § 1030 (e)(1)." *Id*. at 1283.

ANALYSIS: The court first noted that the 8th Circuit has already answered this issue in the affirmative and has held that a cell phone is a computer under this statute. *Id*. The 11th Circuit agreed with the 8th Circuit's determination that the language of the statute is broad enough to encompass any device that uses a data processor. *Id.* The court also agreed that any time the cell phone performs a task, "it performs logical, arithmetic or storage functions." *Id.* The court further concluded that, since the statute does not require any sort of Internet connection to be considered a computer, a cell phone is easily defined as a computer. *Id*.

CONCLUSION: The 11th Circuit held that a cell phone is a computer under 18 U.S.C. § 1030(e)(1), and thus, the defendant's use of a cell phone to call and send text messages warranted imposition of an enhancement under U.S.S.G. § 2G2.1(b)(6). *Id*.

D.C. CIRCUIT

***United States v. Hite*, 769 F.3d 1154 (D.C. Cir. 2014)**

QUESTION: "Whether 18 U.S.C. § 2422(b) requires direct communications with a minor" in order to find criminal liability. *Id.* at 1158.

ANALYSIS: The court first noted that seven of its sister circuits, the 1st, 2nd, 3rd, 5th, 7th, 8th, and 11th Circuits, have considered this issue, and have "rejected a categorical requirement that the defendant communicate directly with a minor, rather than through an adult intermediary." *Id*. at 1160. The court, after analyzing the language of § 2422(b), found that the "ordinary meanings of the verbs" used within the statute "demonstrate that § 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor." *Id*. at 1161. The court further noted that, while it may be true that these verbs typically describe direct interactions, it could not "ignore that customary usage of these verbs also includes the use of intermediaries to transform or overcome another's will." *Id*.

CONCLUSION: The D.C. Circuit held that "a defendant can be convicted under § 2422(b) for communicating an adult intermediary, if the defendant's communications with the intermediary are aimed at persuading, inducing, enticing, or coercing the minor." *Id*. at 1158.

FEDERAL CIRCUIT

***Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201 (Fed. Cir. 2014)**

QUESTION: What should the court take into consideration when determining a jury instruction for the reasonable royalty rates of a patent encumbered by "reasonable, and non-discriminatory" ("RAND") terms. *Id*. at 1229.

ANALYSIS: The court began by reasoning that there is no uniform factor based test that courts can "parrot" for every case involving RAND-encumbered patents. *Id.* at 1230. The Federal Circuit noted that district courts should instruct the jury on the actual RAND commitment at issue and must be cautious not to instruct the jury on any factors that are not relevant to the record developed at trial. *Id.* The court determined that district courts must clarify to the jury that any royalty award must be based on the incremental value of the invention, not the value of the standard as a whole or any increased value the patented feature gains from its inclusion in the standard. *Id.* at 1231. The court also determined that if an accused infringer wants an instruction on patent hold-up and royalty stacking, it must provide evidence on the record of patent hold-up and

royalty stacking in relation to both the RAND commitment at issue and the specific technology referenced therein. *Id.* at 1229.

CONCLUSION: The Federal Circuit held that "district courts must instruct the jury only on the relevant factors specific to the case at issue." *Id.* at 1235.